UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NORTHERN UTILITIES, INC.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-164-P-S***
	)	
LEWISTON RADIATOR WORKS, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON MOTION FOR LEAVE TO AMEND COUNTERCLAIM AND RECOMMENDED DECISION ON MOTION TO DISMISS

The plaintiff, Northern Utilities, Inc., moves to dismiss the claim for punitive damages asserted by defendants Richard Hollis and Lewiston Radiator Works, Inc. (the "Lewiston defendants") in their counterclaim. The Lewiston defendants move for leave to amend that section of their counterclaim. I grant the motion for leave to amend and recommend that the court deny the motion to dismiss.

I. Applicable Legal Standard

The motion to dismiss appears to invoke Fed. R. Civ. P. 12(b)(6), which provides for dismissal for failure to state a claim on which relief may be granted. Northern Utilities, Inc.'s Motion to Dismiss Claims for Punitive Damages, etc. ("Motion to Dismiss") (Docket No. 23) at 1. "[I]n ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim

only if "it appears to a certainty that the plaintiff[s] would not be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

Leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). A court acts within its discretion to deny such leave under the following circumstances: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party and futility of the proposed amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). When leave to amend is sought before discovery is complete and neither side has moved for summary judgment, as is the case here, futility is "gauged by reference to the liberal criteria of Federal Rule of Civil Procedure 12(b)(6)." *Hatch v. Department for Children, Youth & Families*, 274 F.3d 12, 19 (1st Cir. 2001). "In this situation, amendment is not deemed futile as long as the proposed amended complaint sets forth a general scenario which, if proven, would entitle the plaintiff to relief against the defendant on some cognizable theory." *Id*.

II. Leave to Amend

In response to the plaintiff's motion to dismiss, the Lewiston defendants filed a motion to amend their counterclaim. Defendants' Motion to Amend Counterclaim, etc. ("Motion to Amend") (Docket No. 32). The plaintiff opposes the motion, contending that it would be futile. Plaintiff Northern Utilities, Inc.'s Opposition to the Defendants' Motion to Amend Counterclaim, etc. ("Amendment Opposition") (Docket No. 38) at 1. Specifically, the Lewiston defendants seek to revise paragraphs 17 and 19 of their counterclaim, as follows (proposed new material in italics):

> The injury and damage to the person of Hollis and property of Radiator Works and Hollis were caused by acts or omissions of servants and agents of Northern Utilities, including, without limitation, use *for many years* of distribution

> mains *known by Plaintiff* not *to be* suited to the safe transport of natural gas, failure *for many years* to maintain its distribution system, *systematic* failure to inspect its distribution system, and failure to warn counterclaimants or other members of the public of the *long known* danger posed by its said distribution system.
>
> * * *
>
> The injury to person and destruction of property belonging to Radiator Works and Hollis was caused by the negligent acts or omissions of servants and agents of Northern Utilities including, without limitation, use *for many years* of distribution mains *known by Plaintiff* not *to be* suited to the safe transport of natural gas, failure *for many years* to maintain its distribution system, *systematic* failure to inspect its distribution system, and failure to warn counterclaimants or other members of the public of the *long known* danger posed by its said distribution system.

Amended Counterclaim of Lewiston Radiator Works, Inc. and Richard Hollis and Demand for Jury Trial (attached to Motion to Amend), ¶¶ 17, 19 (emphasis added); Answer on Behalf of Defendants Lewiston Radiator Works and Richard Hollis to Plaintiff's Complaint, etc. (Docket No. 11), Counterclaim ¶¶ 17, 19.

The plaintiff contends that this amendment would be futile because the proposed language would not state a claim for punitive damages under Maine law. Amendment Opposition at 1-3.

Under Maine law, punitive damages are available "based upon tortious conduct only if the defendant acted with malice." *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Malice may be proved by evidence that the defendant's conduct was motivated by ill will toward the plaintiff or that the defendant's deliberate conduct, while not motivated by ill will toward the plaintiff, was so outrageous that malice toward the person injured by that conduct can be implied. *Id*. Reckless disregard of the circumstances is insufficient. *Id*. In this case, the plaintiff focuses on paragraph 22 of the Lewiston defendants' counterclaim, Amendment Opposition at 2-3, which states: "The negligent acts and omissions of Northern Utilities, its servants and agents, were malicious, outrageous, intentional, wanton, willful, reckless and done so as to entitle counterclaimants to punitive damages," Counterclaim ¶ 22. It is true that "mere"

negligence is insufficient to create an entitlement to punitive damages under Maine law, but the plaintiff reads both *Tuttle* and the counterclaim too narrowly. The use of the word "negligent" in paragraph 22 does not read paragraphs 17 and 19 out of the counterclaim. *Tuttle* dealt with the legal standard of proof for recovery of punitive damages; it did not address the adequacy of any particular form of pleading an entitlement to punitive damages. Considering the amended counterclaim as a whole, I conclude that it sets forth a general scenario which, if proven, would justify the award of punitive damages.

The motion for leave to amend the counterclaim is granted.

III. Motion to Dismiss

The motion to dismiss addresses the Lewiston defendants' counterclaim in its unamended form, but the plaintiff makes the same arguments against both versions. Amendment Opposition at 1, ¶ 2. If the counterclaim failed to state a claim for punitive damages under Maine law before it was amended, that deficiency has been resolved by the amendment. The plaintiff's argument to that effect, Motion to Dismiss at 2-3, fails for the reasons already discussed.

The plaintiff contends in the alternative that Maine's common-law standard for the award of punitive damages violates the federal constitution. *Id*. at 4-16. This is an issue that will only be reached in this case after trial, if the trial court concludes that the evidence is sufficient to allow the punitive damages issue to go to the jury. At that time, the plaintiff may argue that, even if the Maine common-law standard is met, the only constitutionally acceptable standard, as defined by the Supreme Court, has not been met and may submit proposed jury instructions setting out its view of the proper standard. If the issue is not presented to the factfinder, or if the factfinder awards no punitive damages, the issue will have no impact on this case. If the jury does award punitive damages, the plaintiff then has a basis upon which to seek resolution of the constitutional issue on appeal.

Perhaps anticipating the possibility that its extensive constitutional argument would be deemed premature, the plaintiff contends that requiring it to wait for resolution of this issue, if it arises at all, through the appellate process "do[es] not satisfy due process of law requirements." Motion to Dismiss at 16. The plaintiff asserts that it will otherwise be "subject[ed] . . . to an increased burden of proof because [it] must overturn a jury verdict in order to prevail." *Id*. at 17. Verdicts are regularly overturned when jury instructions are found to have been improper. There is nothing in the nature of the Lewiston defendants' claim for punitive damages that distinguishes it from other claims in this regard. The plaintiff characterizes its possible resort to the appellate process in this case as "after-the-fact Due Process," *id*., a novel concept which the plaintiff contends itself deprives a party who must take an appeal of his right to due process. The plaintiff does not suggest any reason why this argument would not apply to any party taking an appeal and contending that a lack of due process in the proceedings below is one of the grounds for appellate relief.

Conspicuous by its absence from the plaintiff's submissions is any attempt to distinguish *Poe v. Ullman*, 367 U.S. 497 (1961), in which the Supreme Court stated that limitations on the exercise of a federal court's powers have "special urgency in cases challenging . . . state judicial action as repugnant to the Constitution" and reiterated its direction "not to entertain constitutional questions in advance of the strictest necessity." 367 U.S. at 503 (citation omitted). The Supreme Court decisions cited by the plaintiff do not contravene this basic principle and do not support the plaintiff's contention that it is entitled to have the validity of Maine's common law of punitive damages under the federal constitution resolved at this relatively early stage of the proceedings.

Baggett v. Bullitt, 377 U.S. 360 (1964), was a declaratory judgment action in which the plaintiffs brought a facial challenge to state statutes that would unquestionably have been applied to them in the absence of the action, *id.* at 361-66. Here, whether the defendants will be entitled under Maine law to have

their punitive damages claim reach the jury remains very much an open question. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), a national organization brought a declaratory judgment action challenging a state statute that had already been applied to its chapters located in that state, *id*. at 614-15. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the issue was the appropriate standard of proof in an action brought under a state statute to terminate parental rights. The statute had already been applied to the petitioners. *Id*. at 751. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the court held that an award of $145 million in punitive damages under state law in a case in which the compensatory award was $1 million was an irrational and arbitrary deprivation of the defendant's property, *id.* at 412, 429.[1] The specific language cited by the plaintiff from each of these opinions, when considered in context, cannot reasonably be read to suggest that a party raising a federal due process challenge to a principle of state common law is entitled to have that issue resolved before trial.[2]

This case more closely resembles *Kundrat v. Halloran*, 145 F.Supp.2d 865 (E.D. Mich. 2001), where the defendant moved to dismiss an action in which the plaintiff contended that the defendant, a judge, deprived him of liberty and property in violation of the due process clause of the federal constitution by applying a state statute that authorized the issuance of *ex parte* protective orders, *id*. at 868. Among other arguments, the defendant contended that the statute was constitutional and that the plaintiff therefore failed to state a claim on which relief could be granted. *Id*. at 870. The court, citing *Ullman*, held that the

[1] The Supreme Court's decision was based on its analysis of the facts of the case under the principles outlined in *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996). Those principles, 408 U.S. at 418, are not necessarily facially inconsistent with the Maine Law Court's decision in *Tuttle*.

[2] The plaintiff also cites extensively to the dissenting opinion of Justice O'Connor in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42-64 (1991), *e.g.*, Motion to Dismiss at 5, 6, 11, 12, 13-14, 15, 16, asserting that "the Supreme Court adopted Justice O'Connor's dissenting position expressed in . . . *Haslip*" in *Campbell*, *id*. at 5, and that "Justice O'Connor's dissent in *Haslip* was a substantial basis of the majority opinion in *Campbell*," *id*. at 12 n.6. While the majority opinion in *Campbell* does quote some general language from Justice O'Connor's dissent in *Haslip*, 538 U.S. at 417, it is not accurate to characterize the *Campbell* court as adopting the *Haslip* dissent's position on the merits. My analysis relies on the (*continued on next page*)

constitutional issue was not ripe for adjudication when it was possible that the case could be disposed of without the need to address that issue. *Id*. The same reasoning is applicable to the instant case.

IV. Conclusion

For the foregoing reasons, (i) the motion of defendants Lewiston Radiator Works, Inc. and Richard Hollis for leave to amend their counterclaim is **GRANTED** and I recommend that the plaintiff's motion to dismiss the counterclaim of those defendants for punitive damages be **DENIED** without prejudice.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of February 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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majority opinion in each case cited by the plaintiff.

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